

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

76-4213

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SOCIALIST WORKERS PARTY, PETER CAMEJO,
and WILLIE MAE REID,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

NBC, et al.,
Intervenors.

Petition for Review of An Order
of the Federal Communications Commission

BRIEF FOR INTERVENOR
NATIONAL BROADCASTING COMPANY, INC.

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COUNTER-STATEMENT OF
ISSUES PRESENTED FOR REVIEW

(1) Where the United States Court of Appeals for the District of Columbia Circuit has just recently decided the identical issues involved in this appeal, where such Court generally handles appeals of this kind, and where a conflict of Circuits would cause great confusion for broadcasters and candidates, should this Court transfer this case to the District of Columbia under 28 U.S.C. §2112(a) or under its inherent discretionary power to make such a transfer?

(2) Did the Commission abuse its discretion by holding that the broadcast of newsworthy debates between political candidates may qualify for exemption from the equal time requirement as "on-the-spot coverage of bona fide news events" under Section 315(a)(4) of the Communications Act of 1934?

COUNTER-STATEMENT OF THE CASE

National Broadcasting Company, Inc. (herein "NBC") is an Intervenor in this appeal in support of the decision of the Federal Communications (herein the "Commission").

NBC hereby adopts the Counter-Statement of the Case contained in the Commission's brief.

ARGUMENT

I. THIS CASE SHOULD BE TRANSFERRED TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

There are particularly compelling reasons for transferring this case to the United States Court of Appeals for the District of Columbia Circuit.

The Commission has filed a motion to transfer pursuant to 28 U.S.C. §2112(a), and the inherent discretionary power of this Court. We adopt that motion and the Memorandum filed by the Commission in support of it. We shall, therefore, only summarize here what we believe are especially persuasive grounds for the transfer.

First, it is clear that this case is in reality an appeal from the Commission's ruling in Aspen Institute, 55 F.C.C.2d 697 (1975), a ruling which was affirmed in Chisholm v. FCC, No. 75-1951 (D.C. Cir. April 12, 1976), with rehearing denied by the Court en banc (herein "Chisholm"). Petitioners openly argue that the majority in the Chisholm case was wrong and the dissent right. This Court, therefore, is being asked to decide again the precise issues decided by another Circuit and one, moreover, as to which petitions for a writ of certiorari are now

pending in the Supreme Court of the United States. Under these circumstances, transfer is obviously appropriate.

Second, the Court in Chisholm took approximately six months after the oral argument to render its decision. It is obvious from the decision that the Court there undertook a thorough review of the legislative record. In the short time available here, this Court could hardly give the legislative history more than a cursory review and surely could not afford the matter the consideration given in the Chisholm case. This is a further factor in favor of transfer.

Third, the District of Columbia Circuit not only had Chisholm before it, but also had occasion to consider the question of the debates' exemption under Section 315(a)(4) in two other cases instituted in recent weeks.

In McCarthy v. Carter, No. 76-1865, Eugene McCarthy sought review of a district court's refusal to enjoin the debates unless he was permitted to participate in them. In Office of Communication of the United Church of Christ v. FCC, No. 76-1878, petitioner sought review of a Commission ruling that the debates may be broadcast on a non-live basis under certain circumstances. Preliminary injunctive relief

was denied on September 22, 1976 by the District of Columbia Circuit, but both cases are still pending.

The McCarthy case, in particular, bears a striking resemblance to this case since McCarthy sought to be included in the debates as petitioners do here (petitioners' brief at 54). The Court of Appeals did not view McCarthy's position as being sufficiently meritorious to warrant the relief requested. The order in McCarthy was issued by Judges McGowan and Leventhal, so that in all five judges of the District of Columbia Circuit have now focused on the issues involved here in detail, and all the judges of the District of Columbia Circuit have done so to the extent that rehearing en banc was denied in Chisholm.

Fourth, the District of Columbia Circuit is not only familiar with the issues in this case, but it has a special background with respect to appeals from Commission rulings, in general, and Section 315(a) and fairness doctrine matters, in particular. Since most appeals from the Commission and most of the "equal time" and "fairness doctrine" cases are taken to that Court, it is undoubtedly better versed in the objectives of the Communications Act and Section 315(a) than any other Circuit. The transfer

therefore should be made for plain reasons of judicial economy.

Fifth, if this Court hears and decides this appeal on the merits, a confusing situation would result whichever way this Court decided.

If this Court reversed the Commission, a conflict in Circuits would be created which would be impossible to resolve before the November elections. The result would be that broadcasters would be obliged to provide political coverage for some fringe candidates but not for others, with no clear distinction as to which was which. The Commission's ruling was intended to provide nationwide standards for broadcasters. Yet a conflict in Circuits would mean that there would be no nationwide standards. The result would be highly confusing for broadcasters who would not know whether to conform to the rule of this Circuit or that of the District of Columbia Circuit.

If this Circuit affirmed the Commission on the merits, there is still potential confusion in the offing, since the very taking of this case by this Court and its decision could be considered a green light for other candidates to forum shop in still other Circuits to seek a ruling favorable to them. This would not only be an imposition on other Circuits, but would create the first

danger we mentioned with regard to a conflict between Circuits.

Finally, petitioners have no special call for the emergency action of this Court. Petitioners could have participated in the Chisholm case, but chose not to. Petitioners could have submitted amicus briefs supporting the petitions for certiorari before the Supreme Court of the United States in Chisholm, but chose not to. Petitioners could have sought relief before the Commission and then appealed long ago, so as not to compel a last minute review, but again chose not to.

We submit that for all of these reasons the motion to transfer is clearly warranted.¹

II. THE COMMISSION'S RULING SHOULD BE
AFFIRMED ON THE BASIS OF THE
CHISHOLM OPINION.

The factors discussed in Part I of this Brief to support transfer of this matter to the District of Columbia

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1. The authorities in support are fully discussed in the Memorandum accompanying the Commission's Motion to Transfer. See, e.g., American Telephone and Telegraph Co. v. FCC, 519 F.2d 322, 325 (2d Cir. 1975); American Civil Liberties Union v. FCC, 486 F.2d 411, 413 (D.C. Cir. 1973); Farah Mfg. Co. v. NLRB, 481 F.2d 1143, 1145 (8th Cir. 1973); Eastern Airlines, Inc. v. CAB, 354 F.2d 507, 511 (D.C. Cir. 1965).

Circuit argue equally in favor of according substantial weight to the Chisholm majority opinion, which deals with all of the arguments raised by petitioners before this Court.

The briefs filed with the District of Columbia Circuit on behalf of Shirley Chisholm and the National Organization for Women challenged the Aspen Institute ruling on the very grounds set forth in petitioners' brief. All of these grounds were refuted by NBC and other respondents and intervenors.¹ To highlight the striking similarity between petitioners' arguments here and the arguments advanced by the Chisholm petitioners, NBC has lodged with the Clerk of this Court copies of the principal brief filed in that case on behalf of Shirley Chisholm and the National Organization of Women as well as NBC's own brief responding to the various points contained therein. A review of these briefs and the Chisholm decision demonstrate that petitioners' claims have already been fully explored and, for good reason, rejected.

1. Petitioner, of course, could have participated in that case by seeking intervention or as an amicus, but did not.

A Circuit Court having just recently thoroughly considered and decided the precise issues involved here, this Court should affirm on the strength of the Chisholm decision.¹

III. THE COMMISSION PROPERLY INTERPRETED
THE SCOPE OF THE SECTION 314(a) (4)
EXEMPTION.

A. The Commission's Ruling is Re-
quired by the Plain Meaning of
the Statutory Language.

Section 315(a) of the Communications Act contains the following exemptions from the equal opportunities requirement:

"Appearance by a legally qualified candidate on any--

(1) bona fide no scast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

-
1. It bears further emphasis that the Supreme Court of the United States has the matter before it on petitions for certiorari. If the Supreme Court believes that there is any issue meriting review of Chisholm, certiorari can, of course, be granted.

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

The particular words involved here are those in subsection (4):

"on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto)" (emphasis supplied).

Petitioners premise their entire argument on the assumption that the above words of Section 315(a)(4) are fuzzy, unclear and equivocal and that therefore an elaborate exploration of legislative history is needed. We submit that petitioners' premise is wrong. While there may be situations in which the application of the statutory words is unclear, that is not the case here. Here, the exemption in Section 315(a)(4) for "on-the-spot coverage of bona fide news events" must clearly encompass such a major national occurrence as the Ford-Carter debates. In this case, therefore, there is no need to go behind the

plain words of the statute and to follow petitioners in their exploration of diverse statements by individual legislators.

It is, of course, long settled that the first recourse of courts is not to legislative history but to the words of the statute itself. As the Supreme Court said in the landmark case of Caminetti v. United States, 242 U.S. 470 (1917):

"It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.

...

"[W]hen words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent." 242 U.S. at 485, 490 (emphasis added).

See also United States v. Oregon, 366 U.S. 643, 648 (1961);
United States v. Missouri Pacific Railroad Co., 278 U.S. 269,

278 (1929); Globe Seaways, Inc. v. Panama Canal Co., 509 F.2d 969, 971 (5th Cir. 1975); Holtzman v. Schlesinger, 484 F.2d 1307, 1314 (2d Cir. 1973), cert. denied, 416 U.S. 936 (1974); Wirtz v. Local 191, Teamsters, 321 F.2d 445, 448 (2d Cir. 1963); United States v. Zions Savings and Loan Association, 313 F.2d 331, 336 (7th Cir. 1963). In determining the meaning of a particular provision courts are to presume that the statutory words are "used in their ordinary and usual sense, and with the meaning commonly attributed to them." Caminetti v. United States, supra, 242 U.S. at 485-486. See also NLRB v. Plasterers' Union, 404 U.S. 116, 129 n.24 (1971); United States v. Blasius, 397 F.2d 203, 205-206 (2d Cir. 1968), cert. dismissed, 393 U.S. 1008 (1969).

The issue here can thus be reduced to the question of whether the Ford-Carter debates are "bona fide news events" within the plain meaning of those words in Section 315(a)(4).

We submit that the question is hardly debatable. The Court of Appeals in Chisholm had no difficulty with this question. It succinctly noted that "It is indisputable that print media consider such events [debates and press conferences] newsworthy".¹ (slip opinion at 20).

1. Judge Wright in his dissent in Chisholm argued that "newsworthy events" are not the same as "news events." (slip opinion at 34). The distinction by Judge Wright

(footnote continued on next page)

And in a footnote, the Court amplified this statement, saying:

"It seems beyond dispute, from a commonsensical point of view, that the presidential press conference is an important news event. Such conferences are regularly printed in the newspapers--indeed, the New York Times regularly prints a transcript of each Presidential press conference. ... Debates between major candidates are also 'news' in this respect..." (slip opinion at 20 n.20).¹

Common knowledge bears this out. Everyone knows that newspapers and broadcasters reported regularly on the arrangements for the Ford-Carter debates as those arrangements were being made. Both the print and electronic media extensively covered the first confrontation between Messrs. Ford and Carter, sending news journalists to Philadelphia for that purpose. The day following the first confrontation, newspapers throughout the nation reported on the

(Footnote continued from page 12)

eludes us. The Court of Appeals could just as well have noted that print media consider such events news events as well as newsworthy. A news event is obviously newsworthy, and if an event is newsworthy, it is news. Judge Wright's effort to get away from the plain meaning involves no semantic distinction of substance.

1. It merits noting that the typical debate between candidates for the same office is no less a bona fide news event than the acceptance speech of one such candidate at a political convention. Broadcast of the acceptance speech is concededly exempt under Section 315(a)(4); broadcast of the debate cannot be less so. See Chisholm v. FCC, supra (slip opinion at 20, 21 n.22).

event in detail on their front pages. Such respected journals as The New York Times, The New York Post, The Washington Post, The Washington Star, The Los Angeles Times, The Chicago Tribune and countless other newspapers ran banner headlines covering what was said.

Press coverage of the first Ford-Carter debate was not on pages dealing with television reviews or in feature sections, but in the primary news columns on the front pages. Similarly, television and radio journalists across the country reported extensively on every aspect of the event in newscasts. Under these circumstances, it is unthinkable that this debate or its successors can be considered as anything but news events.

Since petitioners cannot rationally argue that a Ford-Carter confrontation is not a "news event," they seek to bypass the plain meaning of those words entirely, seeking solace in excerpts from the legislative history. Of course, as we noted earlier, there may be events as to which the application of the Section 315(a)(4) exemption is unclear, and in such cases legislative history may be instructive. But this case does not involve such an event. The plain and simple meaning of the words "bona fide news events" necessarily encompasses events as filled with news

significance as the Ford-Carter debates. Any elaborate excursion into legislative history is thus unnecessary. Affirmance of the Commission is warranted simply by recourse to what the words of the statute themselves provide. Those words clearly comprehend the current confrontations between Messrs. Ford and Carter.

B. The Commission's Ruling Accords With
 The Broad Congressional Intent In 1959
 To Provide Licensees With Discretion
 To Cover News Events In Which Political
 Candidates Participate.

The Commission's ruling that the broadcast of political debates can qualify for exemption from the "equal time" requirement as "on-the-spot coverage of bona fide news events" was a correct statutory interpretation even apart from the plain meaning of Section 315(a)(4). This is because the Commission's ruling carries out the broad congressional purpose in enacting the 1959 exemptions to loosen the fetters imposed on broadcasters by the general equal time requirement as then interpreted by the Commission and thus to increase the dissemination of news of political events to the viewing public.

Petitioners' argument--simply, that "Congress Intended that Candidate Debates Not Be Exempt From the Equal Time Requirement (petitioners' brief at 11)--is based on

an overly restrictive reading of the legislative history. Thus, they refer to the comments of individual Congressmen to the effect that the 1959 exemptions were narrow remedial provisions seeking only to deal with the controversial decision of the Commission in the so-called "Lar Daly" case, Columbia Broadcasting System (Lar Daly), 18 P & F Radio Reg. 238, reconsideration denied, 26 F.C.C. 715, 18 P & F Radio Reg. 701 (1959) (petitioners' brief at 14-16). Additionally, petitioners devote a large part of their brief to quotations of selected statements from the hearings and floor debates--often hearings and debates on bills other than that which was enacted in 1959--to the effect that individual members of Congress did not want to provide a special exemption from the equal time provision for debates (petitioners' brief at 19-21, 27-29).

Petitioners, however, in focusing on some of the narrow repartee of congressional colloquy, have failed to see the larger context of the 1959 exemptions. As the 86th Congress recognized when it reexamined Section 315 in 1959, the original equal opportunities provision was not intended to be applied to hard news coverage. See S. Rep. No. 562, 86th Cong., 1st Sess. 6, 8-9 (1959). Indeed, petitioners' own quotations amply demonstrate that the enactment of the

Section 315(a) exemptions reflected a congressional determination to make clear the original legislative purpose as well as to overrule the Lar Daly decision:

"[I]t is the primary purpose of this legislation to write back into Section 315 this traditional exemption from the equal-time requirement [for newscasts] and to deal with other things that have always been thought to be exempted from the equal time requirement." (remarks of Rep. Harris, quoted in petitioners' brief at 15) (emphasis added).

"That is the crucial thing in this legislation--to overrule the Lar Daly decision and to make it clear that important news events involving the appearance of a candidate may be covered on-the-spot without giving the right of equal time to other candidates." (remarks of Rep. Harris, quoted in petitioners' brief at 16) (emphasis added).

The 1959 amendment itself makes plain that the overruling of Lar Daly was but one purpose of the Section 315(a) exemptions, which covered not only "newscasts"--the subject of Lar Daly--but also "news interviews," "news documentaries," and "on-the-spot coverage of news events." In fact, the Lar Daly decision served as the catalyst which highlighted a basic problem with Section 315--namely, that it interfered with two other desirable objectives: the dissemination of news of political events and the ability of the broadcasters to cover such news in the exercise

of their journalistic discretion. As the Chisholm majority stated:

"Admittedly, Congress intended that the 1959 amendments would preserve the basic philosophy behind the equal time requirement. At the same time, however, Congress was determined to increase broadcaster discretion and allow increased live broadcast coverage of political news. This was the tone set for the opening of the hearings on the proposed 1959 amendments by Representative Harris, the Chairman of the House Subcommittee on Communications and Power, when he stated:

This section [§315] by providing absolute equality among competing political candidates comes into conflict with two other worthy and desirable objectives:

First, the right of the public to be informed through broadcasts of political events; and

Second, the discretion of the broadcaster to be selective with respect to the broadcasting of such events.

Thus the principle of absolute equality for competing political candidates requires modification in the light of these two additional considerations and that is the specific problem which the Congress must face -- just how far the equality principle should give way to these other two principles. This question is to be developed in the course of these hearings.

"Hearings on H.R. 5389, H.R. 5678, H.R. 6362, H.R. 7123, H.R. 7180, H.R. 7206, H.R. 7602, H.R. 7985 Before the Subcommittee on Communications and Power of the House Committee on

Interstate and Foreign Commerce, 86th Cong.,
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Oren Harris, Chairman)." (slip opinion at
19-20) (footnote omitted) (emphasis added).

These congressional objectives in adopting the 1959 exemptions will be briefly discussed.

(i) The Need for Increased Dissemination of News of Political Events.

The congressional leaders never lost sight of their objective to relax the overly strict "equal time" requirement of Section 315(a) in favor of greater news dissemination. The problem created by the Lar Daly decision was clearly recognized: broadcasters would be forced into a kind of embargo on coverage of news events in order to avoid the impossible burden of presenting all aspirants.¹

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1. For instance, in 1956 there were at least 18 political parties with presidential candidates; the 16 parties other than the Democratic and Republican received less than 1% of the vote. 105 Cong. Rec. 14448 (1959) (remarks of Sen. Smith). Under the Commission's strict interpretation of Section 315, each candidate would receive time equal to that received only by the Democratic or Republican. Thus candidates supported by 1% of the voters would receive 89% of the time. It is hardly surprising that broadcasters would be reluctant to cover news and events involving the major candidates and their views. It would obviously be impossible to carry debates between the major candidates if that meant that all fringe candidates would have to receive like coverage.

The Report of the Senate Committee on Interstate and Foreign Commerce recommending passage of the bill which became P.L. 86-274 made the point succinctly:

"Under the present rigid Federal Communications Commission interpretation of section 315, a broadcaster cannot devote 1 minute to a legally qualified candidate participating in any program whatever the subject, be it atomic energy, the need for adequate defense, a road or bridge ribbon-cutting event, dedicating a post office, or opening a charity drive, without being compelled to make available a minute to every other legally qualified candidate for the same office.

...

"Even the Federal Communications Commission recognizes that its present rigid interpretation of equal opportunity under section 315 does constitute a deterrent to stations permitting the use of their facilities by legally qualified candidates. The inevitable consequence is that a broadcaster will be reluctant to show one political candidate in any news-type program less [sic] he assumes the burden of presenting a parade of aspirants." S. Rep. No. 562, 86th Cong., 1st Sess. 9 (1959) (emphasis added).

That Congress determined, as a result of the Lar Daly decision, to relax generally the equal time structures in form of greater news dissemination cannot be doubted. Thus, the Senate Report stated:

"The [Senate] committee is not unmindful that the class of programs being exempted from the equal time requirements would offer a temptation as well as an opportunity for a

broadcaster to push his favorite candidate and to exclude others. That is a danger. The committee clearly recognizes this to be a definite obstacle but feels that the alternative to standing pat and maintaining status quo could lead to a virtual blackout in the presentation of candidates on the news-type programs. This would not, in the opinion of the committee, serve the public interest. An informed public is indispensable for the continuance of an alert and knowledgeable democratic society. The public should not be deprived of the benefits that flow from this dynamic form of communications during the critical times of a political campaign. The public benefits are so great that they outweigh the risk that may result from the favoritism that may be shown by some partisan broadcasters." S. Rep. No. 562, 86th Cong., 1st Sess. 10 (1959) (emphasis added).

It is thus evident that the congressional intent in 1959 went beyond restoring the status quo ante Lar Daly. The final enactment reveals a much broader objective of enlarging generally dissemination of news of political events to the viewing public.

(ii) The Need for Increased Broadcaster Discretion to Cover the News.

It is equally clear that the second objective referred to by Representative Harris--that of allowing the broadcasters to exercise their discretion as journalists in covering news of political events--was also a constant focus of the hearings and became part of the final enactment.

This was reflected in the requirement that the news event being covered be "bona fide."

The "bona fide" standard established by Congress in the 1959 exemptions was the product of "careful thought by the conference committee," and was believed to be "a test which appropriately leaves reasonable latitude for the exercise of good faith news judgment on the part of broadcasters and networks." 105 Cong. Rec. 17782 (1959) (remarks of Rep. Harris). As the Commission correctly recognized in its Aspen Institute ruling, the test was designed to focus on whether the broadcaster, in deciding to cover a candidate, had made a reasonable and good faith news judgment as to the newsworthiness of the event. (slip opinion at ¶30).¹ This was made clear in the Senate Report:

"The proposal affords the licensee freedom to exercise his judgment in the handling of this type program despite

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1. Even during the debate on H. R. 7895, which contained the famous "incidental to" test later deleted by the Conference Committee, Representative Celler stated:

"In brief, the broadcaster would be permitted by the pending legislative to exercise his judgment as to newscasting of candidates so long as he did that in good faith and presented the news objectively and without distortion." 105 Cong. Rec. 16227 (1959).

the fact that a legally qualified candidate may appear or be heard on such a broadcast." S. Rep. No. 562, 86th Cong. 1st Sess. 14 (1959).

The legislative history also indicates that Congress understood the risk it was taking of possible abuse by broadcasters on behalf of particular candidates but believed that, in the words of Senator Case, "those risks as may be involved are risks which should be taken." 105 Cong. Rec. 17832 (1959). In similar vein, Senator Pastore said:

"An informed public is indispensable for the continuance of an alert and knowledgeable democratic society. The public should not be deprived of the benefits that flow from this dynamic form of communications during the critical times of a political campaign. The public benefits are so great that they outweigh the risk that may result from the favoritism that may be shown by some partisan broadcasters." 105 Cong. Rec. 14440 (1959).

The Senate Report expressly noted that the Committee members had "faith in the maturity of our broadcasters and their recognition to serve the public interest." S. Rep. No. 562, 86th Cong., 1st Sess. 14 (1959). See also 105 Cong. Rec. 3171, 5405 (1959) (remarks of Rep. Cunningham, Sen. Allott). The final report put the considerations this way:

"In establishing this category of exemptions from Section 315, the committee was aware of the opportunity it affords a broadcaster to feature a favorite candidate. This is a risk the committee feels that is outweighed by the substantial benefits the public will receive through the full use of this dynamic media in political campaigns." S. Rep. No. 562, 86th Cong., 1st Sess. 14 (1959).

See also id. at 10, 12 (1959).

Even more, Congress recognized that the 1959 congressional acceptance of the risk of broadcaster abuse may have been constitutionally mandated. See, e.g., 105 Cong. Rec. 5405, 8746, 17832 (1959) (remarks of Sen. Allott, Case, Scott). The danger of governmental intrusion on the journalistic discretion of the broadcaster has been underscored by the Supreme Court in Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 120-121 (1973). The Court there reiterated the fundamental principle that the risk of abuse by journalists is outweighed by the need for a free and vigorous press:

"For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors--newspaper or broadcast--can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values." 412 U.S. at 124-125.

The chilling effect of a holding by this, or by any other, Court that there is no room for the exercise of broadcaster discretion in the equal time area is as obvious today as it was to the 86th Congress. See, e.g., 105 Cong. Rec. 5405, 8746, 17832 (1959). A Florida statute granting political candidates a right to equal space to respond to newspaper criticism was recently invalidated because of just such a chilling effect. As the Supreme Court noted in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 257 (1974), "Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'" Surely, these First Amendment questions reinforce the Commission's, and the Chisholm majority's, interpretation of Section 315(a)(4).

In sum, an overview of the legislative purpose underlying the 1959 exemptions reveals the congressional objectives of loosening the strictures of Section 315 on the broadcasters, thereby encouraging the fuller dissemination of news of political events to the public. The Commission's ruling is in full accord with those congressional objectives.

C. The Commission Has Broad Discretion
 to Interpret the Section 315(a) (4)
 Exemptions and It Did Not Abuse that
 Discretion by Issuing the Aspen In-
 stitute Ruling.

As both the Commission and the District of Columbia Circuit emphasized, the legislative history is replete with references to the 1959 congressional intention to give the Commission discretion to interpret the meaning of the newly enacted exemptions to Section 315(a). Aspen Institute, supra (slip opinion at 119, 23, 26, 40 n.20); Chisholm v. FCC, supra (slip opinion at 4, 15-17, 18, 23, 25, 27, 28, 31, 32, 34, 36).

In enacting the Section 315(a) exemptions Congress deliberately refused to legislate "in complex detail" but chose rather to delegate to the Commission the task of implementing the statutory intent. 105 Cong. Rec. 16227 (1959) (remarks of Rep. Celler); see also 105 Cong. Rec. 14455 (1959) (remarks of Sen. Pastore). The 1959 amendment itself contained a provision, Section 315(c), granting the agency the authority to prescribe appropriate rules and regulations to carry out the provisions of Section 315. Section 315(c) was completely unnecessary in light of the general rulemaking authorization elsewhere in the Communications Act and its very presence indicates the congressional desire for the Commission to review the application of the exemptions.

That the Commission is authorized to develop the meaning of the four exempt categories through case by case adjudication is evident also from the Senate Report:

"[T]he committee in adopting the language of the proposed legislation carefully gave the Federal Communications Commission full flexibility and complete discretion to examine the facts in each complaint which may be filed with the Commission. In this way the Commission will be able to determine on the facts submitted in each case whether a newscast, news interview, news documentary, on-the-spot coverage of news event, or panel discussion is bona fide or a 'use' of the facilities requiring equal opportunity.

"The Congress created the Federal Communications Commission as an expert agency to administer the Communications Act of 1934. As experts in the field of radio and television, the Commission has gained a workable knowledge of the type of programs offered by the broadcasters in the field of news, and related fields. Based on this knowledge and other information that it is in a position to develop, the Commission can set down some definite guidelines through rules and regulations and wherever possible by interpretations.

. . .

"The Commission has adequate authority when it reviews the overall performance of a licensee as it relates specifically to the types of programs exempt by this legislation to issue an appropriate ruling as to whether there was an abuse of the exemption. Rulings in specific cases may lead to some dissatisfaction on the part of both broadcaster and candidates but whatever the ruling of the Commission in a specific complaint,

the Federal Communications Commission can and should consider all complaints in the aggregate in reviewing the overall performance of a license." S. Rep. No. 562, 86th Cong., 1st Sess. 12 (1959).

Indeed, at the Senate hearings, then Commissioner Doerfer strongly recommended that the enacted exemptions be broadly worded in order to allow definitional development over time:

"[E]ventually a definition, a well understood definition, and a reasonable one, and one that is acceptable will develop. But it can only develop by a case-by-case administration. I don't think you can write it before hand...." Hearings on S. 1585, S. 1604, S. 1858, S. 1929 before the Communications Subcomm. of the Senate Comm. on Interstate and Foreign Commerce, 86th Cong., 1st Sess. 96 (1959) (emphasis added).

The legislative intent with regard to the Commission's discretion to interpret the Section 315(a) exemptions is perhaps best summed up by the Chisholm majority:

"It is clear...that Congress intended to give the Commission some leeway in interpreting the four exemptions and in applying them to particular program formats in order to further the basic purpose of the amendment, '[To] enable what probably has become the most important medium of political information to give the news concerning political races to the greatest possible number of citizens, and to make it possible to cover the political news to the fullest degree.' That the Commission has considerable discretion in this area is clear from the Senate Report...[quoting

from S. Rep. No. 562, 86th Cong., 1st Sess. 12 (1949)]" (slip opinion at 15-16) (footnote omitted).

It also bears emphasis that the Chisholm decision underscored the Commission's finding that its ruling would serve the public interest "by allowing broadcasters to make a fuller and more effective contribution to an informed electorate" (slip opinion at 13, quoting ¶27) and thus accomplish the very result Congress hoped to achieve by the enactment of the exemptions. This is surely the case here. Indeed, had the Commission not issued its ruling, the currently scheduled debates between the two major presidential candidates would not be televised because numerous fringe candidates might each have to receive a corresponding allocation of time, an allocation that could not feasibly be made. Thus the effect of reversing the Commission would not be to furnish time for fringe candidates who were not newsworthy, but to cancel newsworthy debates between major candidates to the obvious detriment of the public.¹

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1. The Commission's ruling, of course, does not mean that minority candidates and fringe parties are excluded from network coverage. On the contrary, to the extent that minority candidates and fringe parties participate in newsworthy events, they qualify for the Section 315(a)(4) exemption and thus may obtain exposure they would not have should the exemptions be interpreted restrictively.

Under all of these circumstances, it is clear that no abuse of the Commission's discretion can be found to have taken place.

D. The Various Individual Statements Quoted
 from the Hearings and Floor Debates by
 Petitioners Do Not Compel a Conclusion
 That the Commission Abused Its Discre-
 tion by Issuing the Aspen Institute
 Ruling.

It has already been demonstrated that petitioners' position runs counter to the plain meaning of Section 315(a) (4), and also counter to the broad congressional purpose in 1959 to loosen the fetters imposed on broadcasters and thereby to increase the dissemination of news of political events. Petitioners, of necessity, have constructed their argument around selective quotations made by individual Congressmen and witnesses during the many hearings and debates held both before and after 1959 concerning the advisability of amending Section 315(a). These quotations are then urged as a reason for departing from the plain meaning of "on-the-spot coverage of bona fide news events", and for undercutting the congressional philosophy behind that exemption.

It is obvious that in congressional hearings and debates witnesses and congressmen often state views which

are disparate. Typically, such individual statements provide little guidance to courts engaging in legislative interpretation since quotations can generally be met with counter quotations. Hence, while the quotations gathered by petitioners present interesting footnotes, they obviously cannot be used to detract from the plain meaning of Section 315(a)(4) or from the overall legislative purpose in enacting the Section 315(a) exemptions.

The impropriety of relying on petitioners' quotations from floor debates--especially when they run counter to plain meaning and legislative purpose--is pointed out in United States v. Oregon, supra, 366 U.S. at 648:

"[S]uch statements, even when they stand alone, have never been regarded as sufficiently compelling to justify deviation from the plain language of a statute. They are even less so here for there is powerful countervailing evidence as to the intention of those who drafted the bill."

The danger of reliance on petitioners' selected quotations was also articulated by Justice Jackson in his concurring opinion in Schwegmann Brothers v. Calvert Corp., 341 U.S. 384, 395 (1950):

"Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I

think we should not go beyond Committee reports, which presumably are well considered and carefully prepared. I cannot deny that I have sometimes offended against that rule. But to select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what Congress intended to enact is to substitute ourselves for the Congress is one of its important functions. The Rules of the House and Senate, with the sanction of the Constitution, require three readings of an Act in each House before final enactment. That is intended, I take it, to make sure that each House knows what it is passing and passes what it wants, and that what is enacted was formally reduced to writing. It is the business of Congress to sum up its own debates in its legislation. Moreover, it is only the words of the bill that have presidential approval, where that approval is given. It is not to be supposed that, in signing a bill, the President endorses the whole Congressional Record. For us to undertake to reconstruct an enactment from legislative history is merely to involve the Court in political controversies which are quite proper in the enactment of a bill but should have no place in its interpretation." 341 U.S. at 395-396 (emphasis added).

Similarly, in March v. United States, 506 F.2d 1306 (D.C. Cir. 1974) the Court said:

"The strong support that the Government and the teachers respectively find in the hearings and congressional debates reinforces our conviction that this aspect of the legislative history is at most ambiguous and contradictory and therefore should be ignored in favor of an application of the clear and precise statutory language

and purpose here involved. Indeed, 'this is a case for applying the canon of construction of the way who said, when the legislative history is doubtful, go to the statute.'" 506 F.2d at 1314 (footnotes omitted).

See also NLRB v. Plasterers' Union, supra, 404 U.S. at 129 n.24 (1971) ("[L]egislative materials, if 'without probative value, or contradictory or ambiguous,' should not be permitted to control the customary meaning of words. United States v. Dickerson, 310 U.S. 554, 562 (1940)."); FTC v. Manager, Retail Credit Co., 515 F.2d 988, 995 (D.C. Cir. 1975); Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1127 (D.C. Cir. 1971); Frankfurter, "Some Reflections on the Reading of Statutes," 47 Col. L. Rev. 527, 543 (1947); Murphy, "Old Maxims Never Die: The 'Plain-Meaning Rule' and Statutory Interpretation in the 'Modern' Federal Courts," 75 Col. L. Rev. 1299, 1312, 1316 n.110 (1975).

Reliance on petitioners' selected quotations is particularly unwarranted where, as here, those quotations conflict with other aspects of the legislative history which show that many legislators specifically contemplated that the 1959 exemptions would cover debates. We shall discuss some of these other aspects next.

- (i) Numerous Statements from the Congressional Hearings and Debates Show That the Exemption for On-the-Spot Coverage of Bona Fide News Events Was Intended to Have a Broad Compass Including Debates.

Petitioners garnered examples from the legislative history to show that Congressional leaders intended a narrow interpretation to the term "news events." (petitioners' brief at 19-24, 26-29). But the contrary evidence is more compelling. Thus there is the following colloquy which took place during the floor discussion in the Senate:

"Mr. Holland...In the opinion of the Senator from Florida the words 'news events' would necessarily have reference to current events of news importance. Is that the opinion of the Senator from Rhode Island?

Mr. Pastore. That is correct." 105
Cong. Rec. 17830 (1959).

Senator Scott also indicated the broad scope of this term:

"We looked up the definition of 'news,' Mr. President, and one of the definitions of 'news' is, 'of current interest.' This is a very broad definition...." Id. at 17832.

One need hardly argue that the Ford-Carter confrontations involve "current events of news importance," and come within this "very broad definition" of a news event.

Moreover, some of the witnesses specifically pointed out in the congressional hearings on proposed amendments to Section 315(a) that debates would qualify for exemption from the equal time requirement of Section 315(a) under certain of the proposed provisions. When the Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce was considering recommending an exemption for "special events in the public interest"--a phrase whose meaning was similar to that of, and ultimately developed into, "on-the-spot coverage of bona fide news events"--the typical debate was considered to be included in that term, as was a candidate's acceptance speech. Hearings on S. 1585, S. 1604, S. 1858, S. 1929 before the Communications Subcomm. of the Senate Comm. on Interstate and Foreign Commerce, 86th Cong., 1st Sess. 106, 140, 298 (1959). The exchange between Senator Pastore and Robert W. Sarnoff, then Chairman of the Board of NBC, is particularly illuminating:

"Senator Pastore. ...So the question I raise is this. Do you deem that under special events you could have, let's say, a debate--let's assume you could arrange a debate between the two presidential candidates, one a Republican and one a Democrat. Do you think that would fall under this category of special events?

Mr. Sarnoff. I would interpret it that way; yes.

Senator Pastore. How about you, sir, Mr. Ervin?

Mr. Ervin. I would like to interpret it that way.

Senator Pastore. Why don't you say it should be interpreted that way?

Mr. Ervin. All right. It should be interpreted that way.

Senator Pastore. Let's make a little history here.

Mr. Sarnoff. All right.

Senator Pastore. What do you think about an acceptance speech by a presidential candidate?

Mr. Sarnoff. I think that should be treated the same way; a special event." Id. at 140 (emphasis added).

Commissioner Ford, who had suggested the language of this particular amendment, stated a similar conclusion on behalf of the Commission, in response to a request for views on this exemption:

"In summary the suggested language is an attempt to free broadcast licensees from the provisions of section 315 and to give them freedom to exercise their judgment in the handling of news programs and special events of outstanding national or local importance despite the fact that a legally qualified candidate may appear or be heard on such a broadcast, subject only to the test of all programming as to public interest standards relating to controversial issues. Such an event may be the result of a candidate's official position or of a political nature such as a debate between two of many legally qualified candidates for the same political office." Id. at 298 (letter of June 24, 1959 to Sen. Pastore) (emphasis added).

See also H.R. Rep. No. 802, 86th Cong., 1st Sess. 12 (1959); 105 Cong. Rec. 16229, 16230 (1959).

Petitioners also contend that because the debates were initiated by the candidates and are not under the control of the broadcasters, they do not qualify as bona fide news events (petitioners' brief at 31-34). The short answer to this is that Section 315(a)(4) itself indicates that the station need not be in control of the news event since it explicitly includes "political conventions" over which the station controls neither format nor content:

"In the case of political conventions the respective political parties largely control whether, in what capacity, and to what extent a particular political candidate shall participate in the convention; and the broadcaster exercises his news judgment primarily with respect to whether or not he will provide on-the-spot coverage of a particular political convention, and, if so, what parts...." H. R. Rep. No. 802, 86th Cong., 1st Sess. 7 (1959).

The station also has little or no control of legislative hearings, although on-the-spot coverage of such hearings would clearly be covered under Section 315(a)(4). Thus:

"It cannot seriously be argued that a station which elected to cover the Kefauver crime hearings or the Army-McCarthy hearings was not covering 'bona fide news events' because the control of what occurred, including witnesses, rested largely in the hands of the Committee Chairman." Fadell v. FCC, 25 P & F Radio Reg. 2063 (7th Cir. 1963), Commission brief at 16 (footnote omitted).

Nor does the fact that the candidate may exercise some control over his appearance necessarily disqualify that appearance from being a news event. In Thomas R. Fadell, 40 F.C.C. 380, 25 P & F Radio Reg. 288, aff'd sub nom. Fadell v. FCC, 25 P & F Radio Reg. 2063 (7th Cir. 1963) (per curiam), the Commission held that the substantial degree of control which a trial judge exercises over which cases shall be on the calendar, the questions he will ask of witnesses, the rulings he will make on motions, the sentences or judgments that he will pass, and the statements he will make during the proceedings did not prevent broadcast coverage of the proceedings of his court from being exempt. 25 P & F Radio Reg. at 289. Likewise, the circumstance of the candidate's partial control of a news event such as a debate cannot in and of itself exclude a broadcast thereof from Section 315(a)(4).

Contrary to petitioners' contention, the candidate's motivation in participation in the event has no bearing on

whether on-the-spot coverage of the event is exempt under Section 315(a)(4). The legislative history reveals that Congress specifically entrusted the question whether a particular event should be deemed a "bona fide news event" to the broadcasters and networks, who were to be given "reasonable latitude for the exercise of good faith news judgment" in making the determination. See, e.g., 105 Cong. Rec. 17782 (1959) (remarks of Rep. Harris); National Broadcasting Company, 25 F.C.C. 2d 735, 20 P & F Radio Reg. 2d 301, 303 (1970); In re Complaint Covering CBS Program, "Hunger in America", 20 F.C.C. 2d 143, 17 P & F Radio Reg. 2d 674, 683 (1969).¹

We have not tried to deal with each and every legislator's quotation, but only to show that a fair reading of the legislative history elicits a picture quite different than that drawn by petitioners. There is, in short,

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1. Where there is no extrinsic evidence of an intent on the broadcaster's part to advance a particular candidacy, there can be no question as to the bona fide nature of the program. Thomas R. Fadell, supra, 40 F.C.C. at 381-382; see also Brigham v. FCC, 276 F.2d 828, 830 (5th Cir. 1960); Republican National Committee (Dean Burch), 3 P & F Radio Reg. 2d 647, 651, aff'd by an equally divided court sub nom. Goldwater v. FCC, 3 P & F Radio Reg. 2d 2025 (D.C. Cir.), cert. denied, 379 U.S. 893 (1964).

more than ample particularized evidence of a desire to include debates in the exemption for "on-the-spot coverage of bona fide news events." And, of course, there is the overall purpose of Congress which we discussed earlier as well as the words of the statute itself.

(ii) There is No Merit in Petitioners'
Contentions Based on Congressional
Action Subsequent to 1959.

Petitioners seek to buttress their position with arguments based on congressional action after 1959, first from congressional action relating to the Kennedy-Nixon debates in 1960, and second from congressional inaction in the face of earlier rulings by the Commission which were overturned in Aspen Institute. Neither argument is persuasive.

Petitioners first contend that the 1960 suspension by Congress of the equal time requirement to permit the "Great Debate" between Kennedy and Nixon is evidence of a legislative determination that debate programs were not exempt under the 1959 amendment to Section 315 (petitioners' brief at 44-48). The answer to this simply that the

legislative history of Senate Joint Resolution 207¹ demonstrates that it was not intended to alter or affect the Section 315 exemptions.

Senate Joint Resolution 207 was enacted in order to permit increased broadcast coverage of the then impending presidential and vice presidential campaigns. During hearings before the Senate Committee on Interstate and Foreign Commerce, that Committee considered various ways it

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1. This act was passed on August 24, 1960, and provided as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That that part of section 315(a) of the Communications Act of 1934, as amended, which requires any licensee of a broadcast station who permits any person who is a legally qualified candidate for any public office to use a broadcasting station to afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, is suspended for the period of the 1960 presidential and vice presidential campaign with respect to nominees for the offices of President and Vice President of the United States. Nothing in the foregoing shall be construed as relieving broadcasters from the obligation imposed upon them under this Act to operate in the public interest.

(2) The Federal Communications Commission shall make a report to the Congress, not later than March 1, 1961, with respect to the effect of the provisions of this joint resolution and any recommendations the Commission may have for amendments to the Communications Act of 1934 as a result of experience under the provisions of this joint resolution." P.L. 86-677.

might assist increased coverage of the campaigns. Representatives of each of the three major television networks offered to provide free prime time for use by the major presidential and vice presidential candidates on the condition that they be relieved from any obligation to make equal time available for nominees for these offices of all other parties. S. Rep. No. 1539, 86th Cong., 2d Sess. 5 (1960). The Senate Committee eventually decided to propose legislation allowing the broadcasters the freedom they requested because it was "impressed by the sincere desire of broadcasters to meet their obligation of public service in the national political arena provided their obligation was voluntary." Id.

The purpose of the legislation was to give the broadcasters complete freedom to cover the 1960 presidential and vice presidential campaign as they saw fit without regard to any equal time requirement whatsoever. Congress did not focus on the question of what was or was not permitted under the 1959 amendments.¹ The equal time requirement was suspended for all appearances by presidential or

1. The contention that at the 1960 hearings it was recognized that non-studio debates would give rise to equal opportunities is simply incorrect. Senator Pastore's remarks in connection with the Humphrey-Kennedy debate sponsored by the Charlotte Gazette which are cited in the petitioners' brief at 46 n.7 are taken out of

(footnote continued on next page)

vice presidential candidates. Congress neither stipulated nor intended to influence the type of program which could be broadcast. While debates may have been contemplated by some, they were by no means mandated.¹ In fact, an amendment to the bill which would require the candidates to debate one another was proposed and later withdrawn as impinging on the freedom of the candidates not to debate. 106 Cong. Rec. 14475-14476 (1960).

(Footnote continued from previous page)

context. The discussion dealt with the question of the proper definition of the term "legally qualified candidate" as it was used in Section 315(a). Hearings on S. 3171 before the Communications Subcomm. of the Senate Comm. on Interstate and Foreign Commerce, 86th Cong., 1st Sess. 193-195 (1960).

1. Hearings were held after the election at which representatives of the major networks and the Commission reported on the overall coverage of the 1960 presidential and vice presidential campaign. At the hearings it became plain that the so-called Great Debate, which had given the nation an opportunity to witness then Vice President Richard M. Nixon confront then Senator John F. Kennedy, was only one of the programming innovations which took place as a result of the suspension legislation. Robert Kintner, then president of NBC, testified that his network also produced, among others, an 8-week series of full hour programs called "The Campaign and the Candidates" which presented a detailed background on the campaign issues and the nominees, including four hour long programs devoted to in-depth interviews with the four major candidates. Hearings before the Communications Subcomm. of the Senate Comm. on Interstate and Foreign Commerce, 87th Cong., 1st Sess. 66 (1961). Campaign coverage not only took a variety of forms, including but not limited to debates, but also covered a variety of candidates on programs such as NBC's "Minority Viewpoint." Id. at 69.

Indeed, one of the key reasons offered for the suspension was the fact that the Commission had not yet interpreted the then newly enacted exemptions to clarify their meaning, and the broadcasting industry had indicated that its coverage of the campaign might be circumscribed pending such clarification. S. Rep. No. 1539, 86th Cong., 2d Sess. 2 (1960); 106 Cong. Rec. 14473 (1960) (remarks of Sen. Pastore). Senator Pastore noted that the exact scope of the exemptions had not yet been delineated by August 1960 but stated that they would enable broadcasters "to show or permit to be heard the various candidates as in their honest news judgment might be necessary to give full, meaningful coverage to the significant events of the day." 106 Cong. Rec. 14473 (1960). Thus, one reason the 1960 suspension was proposed and enacted was because "not enough time [had] elapsed to permit full evaluation." of the ability of the 1959 exemptions to achieve this goal. Id.; see also S. Rep. No. 1539, 86th Cong., 2d Sess. 2 (1960).

Thus, the history of the 1960 suspension legislation indicates that Senate Joint Resolution 207 should be viewed as an isolated legislative experiment measuring the impact of total repeal of equal time requirements for a

presidential campaign, and not as limiting the scope of the exemptions previously enacted by Congress.

Petitioners also contend that there was congressional ratification of the Commission's earlier decisions in The Goodwill Station (WJR), 40 F.C.C. 362, 24 P & F Radio Reg. 413 (1962) and National Broadcasting Company (Wyckoff), 40 F.C.C. 370, 24 P & F Radio Reg. 401 (1962) (petitioners' brief at 51-53). The argument is that because Congress sought to amend Section 315 in other respects but did not seek to change the Commission's interpretations in Goodwill and Wyckoff, that inaction constituted ratification of those decisions.

The argument is somewhat disingenuous. The various amendments to Section 315 to which appellants refer were not to the equal opportunity section of the statute but to other sections. Actually, Congress has never directly considered modifying the Section 315(a) exemptions.

Moreover, far from evidencing a Congressional adoption of the Commission's interpretive ruling under the Section 315 exemptions, the legislative history subsequent to 1960 indicates rather a Congressional "hands-off" attitude and an intention to allow the Commission great discretion in developing definitions of the various terms in

Section 315(a). See, e.g., Hearings on H.J. Res. 247 before a Subcomm. of the House Comm. on Interstate and Foreign Commerce, 88th Cong., 1st Sess. 65-68 (1963). The fact that some Congressmen and witnesses later testified that debates might not be included within any of the Section 315(a) exemptions simply indicates their own deference to the Commission's decisions in Goodwill Station and Wyckoff; it does not imply that those decisions were mandated by Section 315(a). While it is true that Congress did not see fit to adopt specific language overturning those decisions, as it could have done, the fact that Congress did not act to undo the Commission's interpretation does not mean that Congress believed the Commission's interpretation was correct. Compare Chisholm v. FCC, supra (slip opinion at 26-27) with Sierra Club v. EPA, No. 74-2063 (D.C. Cir. August 2, 1976) (slip opinion at 23-24). Administrative agencies sometimes do render decisions which do not carry out Congressional intent. Where Congress does not act at all on the specific provisions involved--as was the case here--that silence certainly cannot be construed into a "ratification." Indeed, if silence were a ratification then it bears noting that Congress has had ample opportunity to overrule the Commission's Aspen Institute ruling, but has not chosen to do so.

CONCLUSION

For the foregoing reasons NBC respectfully submits that the appeal should be transferred to the District of Columbia Circuit, or, in the alternative, the ruling of the Commission should be affirmed.

Respectfully submitted,

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